Ideology and Adjudication: The Supreme court OBC Reservations

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A sad fact about the Indian judiciary is that where the judges have felt urgent ideological compulsion they have not let mere canons of discipline stop them. Judgments by smaller benches have prised open what even a nine-judge bench has declared to be the law to such an extent that most of the issues are again open for rewriting. The judgment in Ashoka Kumar Thakur vs Union of India is a case in point.

Adjudication of public issues is an ideological act. Courts say they do their job within the four corners of the law, but the four corners are only corners. The space enclosed may be quite wide, and can permit divergent tendencies, all of them passing for interpretations of the law or the Constitution. It is idle to pretend that this divergence is the result of a pure difference of a juridical character. There is considerable politics in these divergent tendencies, when social issues of significance are involved.

The vicissitudes of the law of reservations after the supposedly authoritative pronouncement in the *Mandal Commission case* (lawyers know it as *Indira Sawhney vs Union of India*) in 1992 make-up is a classic instance. That judgment of nine judges, six of them concurring in upholding the provision of reservations to the Other Backward Classes (*OBCs*) to the extent of 27% in central government services, took a realistic view of caste as an institution of Indian society, its discriminatory character, the need to overcome it, and the role special provisions such as reservations can play in that task.

The Court formulated and answered all the legal issues that have arisen over the years in connection with reservations under the Constitution. The judgment is one of common sense, and succeeds in summing up and trimming the rough edges of the positive content of judicial views in the matter over the previous 40 years, while going along with some of the retrogressive attitudes.

Though in retrospect it is evident that the judgment did open up space for mischief by insisting on identifying some thing called "a creamy layer" in every *OBC* community,

and by expanding the space for judicial meddling by mandating a fact-finding enquiry of a public character by a statutory body into putative backwardness, it was on the whole as good a judicial pronouncement as one could expect within the tradition that views reservations as an instrument for equalising educational and employment opportunities at the threshold, while being mindful of the supposed "injury" that it causes to "efficiency" of the administration.

Reservations can be seen differently, as one instrument for equalising the status and position of castes considered as the basic communities of Hindu society, but courts have never seen it that way. Since judicial discipline demands that only a larger bench of judges can undo the result of any judgment, and since no bench larger than nine in size has gone into the question of reservations or any aspect of it after the *Mandal Commission case*, you would think that things are at least where the *Mandal Commission case* left them. You would be terribly mistaken, however. A sad fact about the Indian judiciary is that where the judges have felt an urgent ideological compulsion they have not let mere canons of discipline stop them. Judgments by much smaller benches than nine have prised open what the nine-judge bench declared to be the law to such an extent — while paying lip service to their duty of obedience to it — that most of the issues are again open for rewriting.

Ashoka Kumar Thakur vs Union of India, a judgment that is now at the centre of controversy because its effect has been that seats in central educational institutions supposedly increased to meet the newly created reservation of 27% for *OBCs* have turned into a bonanza of extra seats for the upper castes, is a case in point. First, the reference to a bench of five judges was unnecessary.

Judicial Indiscipline

The order of reference by the two-judge bench of Arijit Pasayat and Lokeshwar Singh Panta is a textbook case of judicial indiscipline. A whole list of questions (31, if you want the number) were raised, almost all of which were answered in the *Mandal Commission case* and indeed even much before that, and asked to be answered by a Constitution Bench. The only question that may have justified such reference (that too only because of unthinking judicial pronouncements in the recent past) was whether Parliament can by law direct private educational institutions to give reservations to the *OBCs*, which question was finally not answered (except by one of the five judges) on the ground that there was no challenge from private educational institutions.

When the majority of the five-judge bench came to that conclusion, they should have returned the reference instead of answering it, because there was never any doubt

that the government can provide for reservations under the Constitution to *OBCs* in educational institutions owned or financially aided by it. Instead, the blanket order of reference was used by three of the five judges (Arijit Pasayat himself, C K Thakker and Dalveer Bhandari) to read the *Mandal Commission judgment* tendentiously, genuflecting with due respect, but glossing it in a manner that leaves the door open for a reversal in good time. It is easy to see in it conduct most objectionable in juridical terms, but what is more significant is the ideological underpinning of the indiscipline and its effect.

The significance of the "creamy layer" is an instance of what they have achieved. In the *Mandal Commission judgment*, the Court performed the strange feat of deducing a fact from an abstract principle, and declared that there exists a creamy layer in each *OBC* community, and it must be removed from the benefit of reservation given to that community so that the really backward among the backward may not be deprived of the benefits of special provisions. The reasoning proceeds thus: unequals must not be treated as equals; hence the well-endowed among an *OBC* community cannot be counted with the less-endowed ones; hence they must be disentitled to the reservation provision made for that community in the interests of justice; hence it is necessary to identify the creamy layer in each community and declare it ineligible for the reservation given to that community. The question, whether there, in fact, exists a creamy layer as a sub-class within *OBC* communities, if so in which of them, and what is its effect on the availment of reservations by members of the community, whether, for instance, it has given confidence to the others to aspire for higher positions in life rather than come in the way of their advancement, were matters of no relevance to this process of deductive reasoning.

Nevertheless by the time of the *Mandal Commission case*, caste as a social category had come to be accepted by the courts as a class of a kind, eligible for reservations if it is backward. *Ashoka Kumar Thakur vs Union of India* (the judgment was pronounced on 10 April 2008), through the said three judges, introduces a revision: caste becomes a class only after the creamy layer is removed. Thus, the removal of creamy layer is no longer a matter of purported justice within the community as between the more backward and the less backward amongst it, as it was in the *Mandal Commission case*, but a necessary prerequisite for the caste to at all be a class, and *a fortiori* a backward class. This is a very significant conceptual revision, effected silently by a majority of this five-judge bench in a reference that was unnecessary in the first place.

Another instance is the way the same three judges have smuggled in the "economic criterion" for identifying backward classes. They were not called upon to decide whether caste can be the basis for determining backwardness because after a lot of dilly-dallying, the courts, which began with the view that caste can be only one of

the criteria taken into account to identify backwardness, have come round to the view that if a caste is on the whole backward, it can be identified as a backward class, though there can be other ways of identifying backward classes too. This opinion has been approved in the *Mandal Commission case*. But the three judges proceed gamely to pose and answer the same question notwithstanding its finality (at least until more than nine judges sit and reconsider it) and give different answers, while declaring themselves bound by the *Mandal Commission judgment*. They express pain at the fact that poverty deprives people of opportunity to pursue studies and come up in life. It is in general remarkable that about the only time courts in our country have recognised the division of the country into poor and rich and deplored it, is when people have asked for caste-based reservations or rights. They are otherwise normally indifferent to economic cleavages in society. And they will not even learn from documented experience.

As far back as the 1960s, the government of the then *State of Mysore*, the "native" part of which had a systematic programme of encouragement of the non-brahmin communities in education and employment in the pre-Constitution era, strangely found itself stumbling upon the Constitution (as understood by the Supreme Court) in its effort to continue/extend the measures after India dedicated itself to social justice in the post-Constitution era. It therefore introduced poverty-and-occupation-based reservations pending the success of its efforts to continue its programme, while satisfying the finicky stipulations of the Court. Reviewing this attempt, the *Backward Classes Commission* headed by O Chinnappa Reddy, which was later appointed by the successor state of Karnataka, found that it was the brahmins, the lingayats and the vokkaligas that took most of the benefits. That this would happen would be obvious to anyone who knows anything about Indian society, but judges remain determined admirers of the economic criterion. In *Ashoka Kumar Thakur vs Union of India*, Arijit Pasayat and C K Thakker have given the astonishing direction that "to strike the constitutional balance, it is necessary and desirable to earmark certain percentage of seats out of permissible limit of 27% for socially and economically backward classes". And Dalveer Bhandari directs that after 10 years the criterion for reservation must shift to the economically backward. Wanting in discipline or not, the effect is that a majority of three out of the five judges in the bench are found pushing for the economic criterion in determining backwardness, which will find its utility with the kind of smooth lawyer that populates the Supreme Court in the days to come.

Second, and this brings us to the present controversy, the judgment answers questions that nobody asked, which courts are not supposed to do but find themselves doing when they find governments doing what they do not like, not as judges but as political creatures. They were only supposed to be adjudging the constitutional validity

of the *93rd Amendment* which has introduced *Article 15(5)* in the Constitution enabling the government to make a special provision by law for the advancement of backward classes insofar as it relates to admissions to educational institutions including private institutions, and the validity of the consequential law made by the Parliament, namely, the *Central Educational Institutions (Reservations in Admissions) Act, 2006*. In parenthesis, it will be recalled that when the reservations were mooted, the upper castes who have a monopoly of higher education in the better type of institutions, kicked up a big fuss and blackmailed the government into compulsorily increasing the number of seats in every such institution so that the opportunities available to them remain untouched. In other words, they would not share the opportunities that they regard as theirs with the *OBCs* and the government had better not force them to do so in its quest for real equality of oppor tunity. That they succeeded in this blackmail, but still went ahead and challenged the law is an index of the kind of elite this country has. Now, this increase of seats and consequent infrastructure is estimated to cost about Rs 17,000 crore. The blame for the expenditure must squarely be placed on the blackmailing tactics of the upper castes and the union government's weakness in succumbing to it. But the upper castes generated an argument in their favour out of this expenditure: should Rs 17,000 crore be spent on implementing reservations in higher education when primary schooling is in very bad shape for want of funds? At least one of the judges, Dalveer Bhandari, found this crass hypocrisy impressive as an argument against the law.

Relaxing Criteria

What the Court was not called upon to answer is whether and to what extent the government or the educational institutions may relax the qualifying marks to enable the *OBC* students to access the reservations, and what is to be done if they fail to access the seats in sufficient number. It has been the general experience that the first time that reservations are given to any social class, not many are able to access it and a sufficient relaxation of the criterion of selection is needed to make the reservation a reality. It is also a matter of experience that the relaxation will not be needed after a certain time. What is to be done in this regard is a matter of government policy, and while the courts may be called upon to adjudicate the validity of a policy once it is formulated, it is not for them to say what it should be. But three judges thought otherwise. Arijit Pasayat and C K Thakker begin by properly asking the central government to "examine the desirability of fixing cut-off marks in respect of candidates belonging to *OBCs*" but add the uninvited illustration that "five grace marks may be added to *OBC* students".

And then go on to positively mandate that if any seats in the *OBC* quota remain vacant, they shall be filled up by "candidates from the general categories". Dalveer Bhandari is more forthright. He orders that the qualifying cut-off marks may be reduced by not more than 10 (out of 100) for the *OBCs*, but again if the qualif ying *OBC* students fail to avail the 27% reservation, "the remaining seats would revert to the general category". These orders that overstep the powers of the Court have now come home to roost, and in the process proved the vacuity of the loud lament about the creamy layer that is the most jarring note in the judgment: this academic year the 27% *OBC* quota has remained largely unfilled in most of the central educational institutions.

To begin with, the union government took the initiative in leaving the policy to the institutions. The Ministry for Human Resources Development issued an office memorandum (*OM*) dated 20 April 2008 authorising the central educational institutions to "fix cut-off marks for admission/ selection through admission test, etc, for the *OBC* candidates with such differential from the cut-off marks for the unreserved category as each institution may deem appropriate for maintaining the standards of education and at the same time ensuring that sufficient number of eligible *OBC* candidates are available". Maybe the decision to leave it to the institutions was not very wise for educational institutions of the elite variety are the most steeped in brahminical attitudes in our country. But good or bad, the *OM* still left it open for means to be devised so that sufficient number of *OBC* students do enter the institutions. But the Supreme Court again came in the way without so much as acknowledging let alone adjudicating the policy decision taken by the union government. Someone moved the Supreme Court for a "clarification" in the matter and the Court, after hearing the government too, which must have informed it of the *OM* dated 20 April 2008, passed an order on 14 October, approving the policy pronouncement of Dalveer Bhandari, namely, relaxation of not more than 10 in the qualifying cut-off marks and filling of unfilled seats by the general category, "having regard to the observations made in the judgments pronounced by this Court". What observations? Only Dalveer Bhandari made such an observation. Arijit Pasayat and C K Thakker said something else. Chief Justice K G Balakrishnan whose contribution to the *Ashoka Kumar Thakur case* is scrupulous in following the sympathetic spirit of the *Mandal Commission judgment*, rightly avoided making any policy pronouncement. The last judge, R V Raveendran, who expressed an impossible agreement with all the other four, wrote a brief judgment which too avoids the issue.

Yet, the same five judges sitting again endorse what is a policy made by *judicial fiat* by one of them, implicitly overruling the government's policy decision without even referring to it. The result is that the upper castes who earlier had much of the 100% to themselves now have more than 100%. The urge the courts — which remain

a bastion of the upper castes — feel in the matter of preempting what they believe to be un desirable policy decisions in connection with reservations is nowhere more evident.

It is not possible to conclude this without commenting on the extraordinary interpretation put by the *Jawaharlal Nehru University* (*JNU)* on the order of 14 October 2008 passed by the Supreme Court. It should be obvious to even a child that what the Court said was that if a student in general has to get, say, 40 marks in the qualifying test or interview or whichever combination of two the institution prescribes, to be eligible for selection to a course, then in the case of *OBCs* it will be sufficient if the candidate gets 30 marks. It takes exceptional intelligence to read it as anything else. But they evidently possess that in that university. A committee of five teachers concluded that what the Supreme Court meant when it spoke of relaxation of not more than 10 in the cut-off marks was that the marks obtained by an *OBC* candidate must be within 10 marks of the least marks obtained by those who have qualified in the general category for the *OBC* candidate to be eligible for selection! Social scientists for some time now have been speaking much of the legitimacy of diverse "readings" of "texts" but one does hope that in the *JNU* they have not carried it to misreading of plain English.